No. 09-636

In the Supreme Court of the United States

SAMUEL SHABAZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether *Davis* v. *United States*, 512 U.S. 452 (1994), which held that a suspect's invocation of the right to counsel must be unambiguous in order to require the police to cease questioning him, applies to initial invocations of the right as well as to invocations of the right that follow an initial waiver of that right.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 579 F.3d 815.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 2009. The petition for a writ of certiorari was filed on November 24, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional plea of guilty in the United States District Court for the Northern District of Illinois, petitioner was convicted of bank robbery (Counts 1 and 2), and attempted bank robbery (Count 3), all in violation of 18 U.S.C. 2113(a). He was sentenced to 188 months of imprisonment, to be followed by three years

of supervised release. The court of appeals affirmed. Pet. App. 1-11.

1. On December 21, 2007, agents of the Federal Bureau of Investigation (FBI) arrested petitioner at his home in Chicago, Illinois. The agents acted under the authority of an arrest warrant naming petitioner as a suspect in a robbery at a TCF Bank located in Oak Lawn, Illinois. FBI agents and Oak Lawn Police Department officers took petitioner to the Calumet City Police Department, where petitioner confessed to twice robbing the TCF Bank and also attempting to rob the Stanford Bank and Trust in Oak Lawn. Petitioner provided many details about the planning and execution of the robberies, his motive, and the disposition of the robbery proceeds. He also identified himself in bank surveillance photographs and signed them to acknowledge that he was the person depicted in them. Pet. App. 1-2, 4.

2. Petitioner was indicted on one count of attempted bank robbery and two counts of bank robbery, all in violation of 18 U.S.C. 2113(a). Pet. App. 1-2. He moved to suppress his confession on the ground that it was taken in violation of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), because the agents questioned him after he had requested counsel and because he did not validly waive his *Miranda* rights. Mot. to Suppress 1-3.

At the suppression hearing, petitioner and the government presented significantly different versions of the events surrounding petitioner's confession. FBI Agent Brian Watson testified that before petitioner was taken into the interview room, he was permitted to use the bathroom. Thereafter, Agent Watson heard petitioner use the word "attorney" or "lawyer," but did not remember the context in which the word was used. Agent Wat-

son testified, however, that he was sure petitioner did not request an attorney. Once inside the interview room, Agent Watson identified those present, explained to petitioner why he had been arrested, and outlined the topics the FBI wished to discuss with him. Agent Watson read petitioner his *Miranda* rights and asked him to sign an "advice of rights" waiver form. Petitioner stated that he understood his rights, but did not want to sign the form. Petitioner said that he would continue to speak to the FBI but would stop any time he did not want to answer a question. Agent Watson further testified that the agents did not promise petitioner leniency in return for his statement. Pet. App. 2-3.

Petitioner testified that, after arriving at the police station and using the restroom, he asked Agent Watson, "[A]m I going to be able to get an attorney?" and Agent Watson replied, "[L]et's just get you down here," pointing to the interview room. Petitioner further testified that, as he entered the interview room, Agent Watson told him that "[W]e know what you've been doing," and asked petitioner to "start at the beginning." Petitioner testified that he asked for a lawyer several times but was ignored. He also testified that at some point he asked to call his girlfriend and a friend, but that the officers refused to allow him to do so until he agreed to cooperate. Petitioner also testified that the officers promised him leniency if he cooperated. Pet. App. 3.

3. The magistrate judge who conducted the hearing recommended that the suppression motion be denied. Pet. App. 33-53. The magistrate judge credited petitioner's testimony that, before entering the interview room, he had asked Agent Watson, "[A]m I going to be able to get an attorney?" *Id.* at 5, 39-40. The magistrate judge determined that Agent Watson did not answer

that question, but instead deferred responding until the police had petitioner in the interrogation room and could advise him of his rights. *Id.* at 5, 40. The magistrate judge rejected petitioner's account of what had occurred inside the interview room, crediting instead the account given by the government witnesses. *Id.* at 5, 47. Finally, the magistrate judge found that petitioner had knowingly and voluntarily waived his *Miranda* rights once he was in the interview room. *Id.* at 5, 47-49. The magistrate judge noted that petitioner "testified that he had a good understanding of what his rights were" because he "had been presented with [an advice of rights] form in connection with an earlier criminal matter." *Id.* at 46.

The district court adopted the magistrate's report and recommendation and denied the motion to suppress. Pet. App. 12-30. The court reviewed the record and found "no reason to set aside the magistrate judge's credibility determination and findings." *Id.* at 23. As relevant here, the court determined that petitioner was not questioned in violation of *Miranda* after requesting a lawyer, *id.* at 24-26, and knowingly, intelligently, and voluntarily waived his rights when he decided to speak with the police, *id.* at 20-24.

Petitioner then entered into a conditional plea of guilty to all three charges. Pet. App. 2; Judgment 1. He was sentenced to 188 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

4. The court of appeals affirmed. Pet. App. 1-11. First, the court rejected petitioner's claim that his question—"[A]m I going to be able to get an attorney?"—amounted to an unambiguous invocation of his *Miranda* rights so as to preclude police questioning. *Id.* at 6-9.

The court explained that, under *Davis* v. *United States*, 512 U.S. 452, 459 (1994), police officers need not cut off questioning unless a suspect makes an unambiguous request for counsel. Pet. App. 6. The court "agree[d] with the district court that [petitioner's] question was not a clear request for counsel under the circumstances." *Id.* at 7. The court explained that the question itself did "not clearly imply a present desire to consult with counsel" and that the circumstances in which the question was asked support the conclusion that petitioner did not unambiguously request counsel. *Id.* at 8-9 (internal quotation marks omitted). The court noted that as soon as petitioner was led into the interview room, he was advised of his *Miranda* rights, and although he could easily have requested an attorney at that point, he chose to talk to the officers and "never followed up on his initial question in the hall." *Id.* at 9. The court concluded that "[u]nder those circumstances, the officers were under no obligation to stop questioning [petitioner]." *Ibid.*

The court of appeals then rejected petitioner's other claim, which was that he did not validly waive his *Miranda* rights. Pet. App. 9-11. The court adopted the factual findings and credibility determinations of the magistrate judge and concluded that, under the totality of the circumstances, petitioner had knowingly and voluntarily waived his rights. *Id.* at 10-11.

ARGUMENT

Petitioner contends (Pet. 4-16) that this case presents the question whether the rule announced in *Davis* v. *United States*, 512 U.S. 452 (1994)—that a suspect's invocation of the right to counsel must be unambiguous to trigger the requirement that the police cease ques-

tioning him—applies to both post-waiver invocations of the right to counsel (the facts in *Davis*) and to initial invocations of that right (the facts in this case). Petitioner did not, however, raise that issue before either the district court or the court of appeals. As a consequence, the court below did not address it. This Court should not review the question in the first instance. In any event, the court below correctly applied *Davis* and determined that, under the circumstances here, petitioner did not unambiguously invoke his right to counsel.

1. In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court held that, in order to "dispel the compulsion inherent in custodial" interrogation, certain warnings must be given "at the outset of the interrogation." *Id.* at 457-458. Those warnings advise the suspect that he has the right to remain silent, that any statements he makes can be used against him in court, that he has the right to consult with counsel, and that if he cannot afford an attorney, one will be provided for him prior to questioning. *Id.* at 479. A suspect who receives these warnings may then choose to waive or invoke his rights. If the suspect invokes his right to counsel, the police must cease questioning him until counsel has been made available to him, unless he initiates further contact with the police. *Edwards* v. *Arizona*, 451 U.S. 477, 484-485 (1981); see also *Maryland* v. *Shatzer*, No. 08-680 (argued Oct. 5, 2009) (considering possible circumstances in which *Edwards* protection lapses).

In *Davis* v. *United States*, the Court addressed what a suspect must do to invoke the right to counsel. There, the police provided the suspect with *Miranda* warnings, he initially waived his rights to silence and to counsel, and one and one-half hours later, he said, "Maybe I should talk to a lawyer." 512 U.S. at 454-455. The Court

concluded that the statement was insufficient to invoke the right to counsel. *Id.* at 458, 462. The Court held that, in order to invoke his right to counsel, a suspect must "unambiguously" request counsel—that is, "he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.* at 459. If a suspect makes a statement "that is ambiguous or equivocal," the police are not required to cease questioning him. *Ibid.* Nor are the police required to ask questions to clarify an ambiguous reference to counsel, although it will often be "good police practice" to do so. *Id.* at 461-462.

An "objective inquiry" is required, the Court explained, to "avoid difficulties of proof and to provide guidance to officers conducting investigations." *Davis*, 512 U.S. at 458-459. And, the Court determined, an unambiguous invocation standard best balances the Fifth Amendment interest in protecting against official compulsion and society's interest in uncovering and prosecuting criminal activity. *Id.* at 459-460. A rule that would require police officers to cease questioning a suspect when they "do not know whether or not the suspect wants a lawyer * * * 'would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity.'" *Id.* at 460 (quoting *Michigan* v. *Mosley*, 423 U.S. 96, 102 (1975)).

2. Although *Davis* addressed the factual situation of a suspect who initially waived his *Miranda* rights and then attempted to invoke them, the majority of courts of appeals have applied the *Davis* standard to both initial and post-waiver invocations of *Miranda* rights. See *United States* v. *Lee*, 413 F.3d 622, 626 (7th Cir. 2005); *United States* v. *Johnson*, 400 F.3d 187, 194-195 (4th

Cir.), cert. denied, 546 U.S. 856 (2005); *United States* v. *Syslo*, 303 F.3d 860, 866 (8th Cir. 2002) (per curiam); *United States* v. *Brown*, 287 F.3d 965, 972-973 (10th Cir. 2002); *United States* v. *Suarez*, 263 F.3d 468, 482-483 (6th Cir. 2001), cert. denied, 535 U.S. 991 (2002); *United States* v. *Hurst*, 228 F.3d 751, 759-760 (6th Cir. 2000); *United States* v. *Posada-Rios*, 158 F.3d 832, 867 (5th Cir. 1998), cert. denied, 526 U.S. 1031, 526 U.S. 1080, and 526 U.S. 1137 (1999); *Grant-Chase* v. *Commissioner, N.H. Dep't of Corr.*, 145 F.3d 431, 436 & n.5 (1st Cir.), cert. denied, 525 U.S. 941 (1998).

The Second and Ninth Circuits, on the other hand, have limited the *Davis* rule to post-waiver invocations. See *United States* v. *Plugh*, 576 F.3d 135, 142-143 (2d Cir. 2009); *United States* v. *Rodriguez*, 518 F.3d 1072, 1077-1080 (9th Cir. 2008). Those circuits have held that if a suspect's initial invocation of the right to counsel is ambiguous, officers are limited to asking questions aimed at clarifying the suspect's wishes concerning his *Miranda* rights. *Plugh*, 576 F.3d at 139 & n.4, 144; *Rodriguez*, 518 F.3d at 1079-1080.[1]

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[1] Similarly, some state courts of last resort have disagreed on whether the *Davis* requirement of an unambiguous invocation applies to an initial invocation of *Miranda* rights, as opposed to a post-waiver invocation. Compare, *e.g.*, *State* v. *Tuttle*, 650 N.W.2d 20, 28 (S.D. 2002) (declining to apply *Davis* standard to initial invocation); *State* v. *Holloway*, 760 A.2d 223, 228 (Me. 2000) (same); *State* v. *Leyva*, 951 P.2d 738, 743 (Utah 1997) (same), with, *e.g.*, *Monroe* v. *State*, 126 P.3d 97, 101 (Wyo. 2006) (applying *Davis* standard to initial invocation); *In re Christopher K.*, 841 N.E.2d 945, 964-965 (Ill. 2005) (holding that *Davis* standard applies to initial invocation); *Ex parte Cothren*, 705 So. 2d 861, 862-867 (Ala. 1997) (applying *Davis* standard to initial invocation), cert. denied, 523 U.S. 1029 (1998); *State* v. *Williams*, 535 N.W.2d 277, 285 (Minn. 1995) (same); *Moore* v. *State*, 903 S.W.2d 154, 157-158 (Ark. 1995) (same); *People* v. *Crittenden*, 885 P.2d 887, 912-913 (Cal. 1994) (same),

Despite the disagreement among the circuits on whether the *Davis* rule applies to an initial invocation of *Miranda* rights, review is unwarranted in this case. First, petitioner did not present this question to the district court or the court of appeals, and neither court addressed it. Rather, petitioner simply argued that his question, "[A]m I going to be able to get an attorney?" constituted an unambiguous request for counsel that precluded any questioning. See Pet. C.A. Br. 2-4; Pet. Objections to Magistrate's Report 9-11. Petitioner never suggested that the standard for invocation of *Miranda* rights differed based on whether the suspect already had waived his rights. He did not even mention *Davis* in the court of appeals until his reply brief, and he never cited *Plugh*, *Rodriguez*, or any other of the cases he now cites that address whether *Davis* applies to initial invocations of *Miranda* rights. In view of petitioner's failure to raise the issue, and the court of appeals' failure to discuss it, this Court's review is not warranted. See, *e.g.*, *Montejo* v. *Louisiana*, 129 S. Ct. 2079, 2092 (2009) ("[W]e are a court of final review, not of first view.") (internal quotation marks omitted).

Second, petitioner would be entitled to no relief even in the circuits that have limited *Davis* to post-waiver invocations. In those circuits, when a suspect has made an ambiguous or equivocal request for counsel, any questioning is limited to clarifying the suspect's wishes. See p. 8, *supra*. Here, following petitioner's statement "[A]m I going to be able to get an attorney?"—which the courts below construed as an ambiguous request—the officers did not pose substantive questions to petitioner

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cert. denied, 516 U.S. 849 (1995); *State* v. *Morris*, 880 P.2d 1244, 1253 (Kan. 1994) (same).

concerning his involvement in the bank robbery until after petitioner had made clear his wishes concerning his Fifth Amendment rights. After entering the interrogation room, the officers explained to petitioner why he had been arrested and outlined the topics they wished to discuss with them. Pet. App. 2. They then advised him of his *Miranda* rights and asked him to sign an "advice of rights" form. Petitioner stated that he understood his rights, and, while he refused to sign the form, he said that he would continue to speak to the agents but would stop any time he felt he did not want to answer a question. *Id.* at 2-3. Only then did the agents commence questioning him about the robbery. *Id.* at 3.

Third, the court of appeals' application of *Davis* to initial invocations of the right to counsel is correct. *Davis* does not support a distinction between a defendant who initially waived his *Miranda* rights and then reconsidered (the facts in *Davis*) and a suspect who is considering in the first instance whether to invoke his rights following warnings (the facts in this case). *Davis* states a general rule: a request for counsel must be unambiguous, so that a reasonable police officer can recognize it as an invocation of *Miranda* rights and respect the suspect's wishes. *Davis*, 512 U.S. at 459. That reasoning applies equally to both initial and post-waiver invocations of *Miranda* rights. Presuming that the suspect has requested counsel when he has made an ambiguous invocation—whether it is an initial invocation or a post-waiver invocation—would "needlessly prevent the police from questioning a suspect * * * even if the suspect did not wish to" exercise his rights. *Id.* at 460.

The magistrate judge, district court, and court of appeals all concluded that, on the facts of this case, petitioner did not evidence a clear desire to have the assis-

tance of counsel. Pet. App. 7. That conclusion is correct: Petitioner's question does not indicate that he wished the assistance of counsel during questioning, and the surrounding circumstances make clear that petitioner was willing to speak to the police without a lawyer.[2]

3. Petitioner contends in passing (Pet. 12-13) that the court of appeals erred in concluding that he validly waived his *Miranda* rights. But as petitioner notes, "[i]nvocation and waiver [of *Miranda* rights] are entirely distinct inquiries," Pet. 8 (brackets in original) (quoting *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984) (per curiam)); see Pet. 11, 13, and he does not present any separate question in his petition regarding waiver, Pet. i. In any event, the court of appeals correctly determined that petitioner knowingly, intelligently, and voluntarily waived his rights. Pet. App. 9-11. After receiving *Miranda* warnings, petitioner stated that he under-

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[2] Petitioner argues (Pet. 11) that his statement "Am I going to be able to get an attorney?" "satisfie[d] *Miranda*'s standard for indicating 'in any manner' that he preferred to remain silent." While the *Miranda* Court stated that questioning must cease "[i]f the individual indicates in any manner * * * that he wishes to remain silent" (384 U.S. at 473-474) or "to consult with any attorney before speaking" (*id.* at 444-445), it did not purport to address how to interpret an ambiguous statement about either counsel or silence. The point of that passage was that a suspect need not use particular words to invoke his right to counsel (*id.* at 444-445, 473-474) or to remain silent (*id.* at 473); he may do so "in any manner." *Id.* at 444-445, 473-474. The Court did not address the level of clarity required in the suspect's statement. The decision below therefore does not conflict with this Court's decision in *Miranda*.

Petitioner also contends (Pet. 5) that the decision below is "contrary to this Court's holding in *Davis*," but he is mistaken, because *Davis* did not address the factual situation of an initial invocation of the right to counsel, 512 U.S. at 454-455; see Pet. 5 n.2, and because the court of appeals applied the same rule as in *Davis*, Pet. App. 6.

stood his rights and immediately agreed to talk with the police. *Id.* at 10. His interview lasted approximately one hour, and he was not deprived of any necessities or coerced in any manner. *Id.* at 10-11, 22-23.

Petitioner also suggests (Pet. 8-9) that requiring that a suspect's initial invocation of his right to counsel be unambiguous improperly relieves the government of its heavy burden of establishing that the suspect waived his *Miranda* rights, and instead shifts to the suspect the burden of establishing the lack of such a waiver. But that argument confuses the question whether a suspect has invoked his *Miranda* rights with the question whether he waived those rights. Whether or not a suspect has clearly invoked his right to counsel determines whether there may be further questioning of the suspect. But even if a suspect has not clearly invoked his right to counsel so as to preclude further questioning, the burden remains on the government to establish a knowing, intelligent, and voluntary waiver of the suspect's right to counsel. The court of appeals recognized that "the Government bears the burden of proving that [petitioner's] statement was made following a knowing, voluntary, and intelligent waiver," and it correctly determined that the government had met its burden. Pet. App. 10-11.

4. There is no need to hold this case pending the Court's decision in *Berghuis* v. *Thompkins*, cert. granted, No. 08-1470 (oral argument scheduled for Mar. 1, 2010). That case presents issues concerning the application of *Miranda*, including whether a suspect must unambiguously invoke the right to remain silent in order to preclude police questioning; whether the police may question a suspect who has been informed of his *Miranda* rights, has stated that he understood his rights,

and has not invoked or waived those rights; and whether a suspect who is aware of his rights waives them when he knowingly, intelligently, and voluntarily responds to police questioning. In its amicus brief, the government has argued that the *Davis* standard should apply to both initial and post-waiver invocations of the right to silence. U.S. Amicus Br. at 13-19, *Thompkins*, *supra* (No. 08-1470).

Although the Court in *Thompkins* may address related issues to the question petitioner presents, this case should not be held pending the outcome in *Thompkins*, because petitioner failed to preserve any argument regarding application of the *Davis* standard to initial invocations of *Miranda* rights, see p. 9, *supra*, and because petitioner made at most an ambiguous request for counsel and the police did not obtain any substantive statements until advising him of his *Miranda* rights and obtaining a waiver, see *id.* at 9-10. Further review therefore is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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